

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JOE ROME)	
Claimant)	
VS.)	
)	Docket No. 170,650
WESTERN LIVESTOCK EXPRESS)	
Respondent)	
AND)	
)	
NATIONAL AMERICAN INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

The claimant appealed Administrative Law Judge Bruce E. Moore's February 17, 2000, Order. On July 19, 2000, the Appeals Board heard oral argument by telephone conference.

APPEARANCES

The claimant, Joe Rome of Holcomb, Kansas, appeared pro se. The respondent and its insurance carrier appeared by their attorney, Rex W. Henoch of Lenexa, Kansas.

RECORD AND STIPULATIONS

The record consists of the transcript of the proceedings on claimant's Petition for Fees Pursuant to K.S.A. 44-536(g) held on February 17, 2000, and the pleadings in the Division of Workers Compensation file.

ISSUES

On February 17, 2000, this matter came before the Administrative Law Judge on claimant's Petition for Fees Pursuant to K.S.A. 44-536(g). In an Order dated February 17, 2000, the Administrative Law Judge denied claimant's request for an allowance for post-award attorneys fees to be assessed against the respondent. The Administrative Law Judge found any attorney fees that claimant's attorney is entitled for the representation of the claimant in this post-award matter should be paid out of the funds recovered through the attorney's efforts.

Claimant's attorney offered and the Administrative Law Judge admitted into evidence the attorney fee contract entered between the claimant and his attorney on February 25, 1999. The Administrative Law Judge in his Order approved the attorney fee contract that provided for post-award attorney fees to be paid, subject to the approval of the Director, out of any additional compensation recovered. For post-award application for additional medical treatment, attorney fees based on an hourly rate of \$125.00 per hour will be requested for payment by the respondent also subject to the approval by the Director. The Administrative Law Judge, therefore, found claimant's attorney was entitled to receive 25% of the additional compensation recovered plus reasonable expenses.

At the February 17, 2000, hearing, claimant was represented by his attorney of record, Seth G. Valerius. Mr. Valerius informed the Administrative Law Judge that he had telephoned the claimant and left a message as to the time, place, and date of the hearing. Also, Mr. Valerius offered a letter from his office dated February 14, 2000, which was admitted into the record, that informed claimant of the time, place, and date of the hearing. Mr. Valerius also informed the Administrative Law Judge that claimant would not agree for Mr. Valerius' attorney fees to be paid out of the recovery and insisted the respondent pay any attorney fees owed. After the claimant received the Administrative Law Judge's February 17, 2000, Order, he timely appealed the Order to the Appeals Board.

In claimant's application for review, he alleges he terminated Mr. Valerius' representation in this matter on September 9, 1999. But the Workers Compensation Division file does not have any evidence of this termination. After this hearing was held, Mr. Valerius filed a Motion of Withdrawal of Counsel that was granted by the Administrative Law Judge in an Order dated March 15, 2000. Claimant argues, in his application for review, "I pray to appeal any & all work by Seth since he has not performed as agreed or in my best interest." Claimant also argues, in his brief before the Appeals Board, if attorney fees are not assessed against respondent, then Mr. Valerius is not entitled to any fees because Mr. Valerius representation was fraudulent. Furthermore, the claimant argues the Appeals Board should disallow Administrative Law Judge Moore's Order because Judge Moore's Order was "based on discrimination against the claimant."

In contrast, the respondent contends the Appeals Board should affirm the Administrative Law Judge's Order. Respondent argues, based on Mr. Valerius' demand, it decided to pay the claimant the overpayment of weekly temporary total disability benefits in the sum of \$5,560.00 instead of paying the cost to litigate the demand and the possibility of penalties being assessed for non-payment of the demand. Accordingly, the respondent asserts the \$5,560.00 amount represents an additional award of disability compensation as provided for in K.S.A. 1999 Supp. 44-536(g) as follows:

If the services rendered under this subsection by an attorney result in an additional award of disability compensation, the attorney fees shall be paid from such amounts of disability compensation.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs and the parties' arguments, the Appeals Board finds the Administrative Law Judge's February 17, 2000, Order should be affirmed.

An order concerning the request for payment of post-award attorney fees pursuant to K.S.A. 1991 Supp. 44-536(g) is a final order and the Appeals Board has jurisdiction to review the order pursuant to K.S.A. 1991 Supp. 44-551(b)(1).¹

The original Award was entered in this case on December 12, 1997. At that time, claimant was representing himself pro se. The original Application for Hearing was filed on November 2, 1992, on behalf of claimant by his attorney, Jerry L. Soldner of Garden City, Kansas. Mr. Soldner withdrew from representing claimant in this case in an Order dated May 26, 1994. Jim D. Mills, attorney at law, also from Garden City, Kansas, then entered his appearance to represent the claimant. Mr. Mills withdrew from representing the claimant on April 14, 1997.

Claimant then represented himself before the Administrative Law Judge; in the appeal of the Administrative Law Judge's December 12, 1997, Award to the Appeals Board; and in the appeal of the Appeals Board's May 28, 1998, Order to the Kansas Court of Appeals.

The Administrative Law Judge's December 12, 1997, Award for a March 8, 1991, work-related accident and right shoulder injury granted claimant 98 weeks of temporary total disability compensation at \$278.00 per week or \$27,244.00 followed by 317 weeks at \$11.73 per week or \$3,718.41 for a four percent permanent partial general disability based on a four percent permanent functional impairment, making a total award of \$30,962.41. The Administrative Law Judge denied claimant's request for a work disability and further found claimant had proved only a right shoulder injury arising out of and in the course of his employment. Claimant had failed to meet his burden of proving any other injuries, including an injury to his neck, or other medical conditions.

In a November 3, 1993, preliminary hearing Order, the Administrative Law Judge had granted claimant's request for medical treatment and temporary total disability benefits for an alleged neck problem. In fact, on June 30, 1993, claimant underwent a cervical discectomy for his neck condition. Pursuant to this preliminary hearing Order, respondent paid claimant 20 weeks of temporary total disability compensation at \$278.00 per week or \$5,560.00, plus medical treatment costs in amount of \$30,343.56.

Claimant timely appealed the Administrative Law Judge's Award to the Appeals Board. In the May 28, 1998, Order, the Appeals Board granted claimant a 21 percent permanent partial general disability based on a work disability also for only his right shoulder injury. The

¹See Shirley v. Vulcan Materials Company, WCAB Docket No. 165,635 (September 1995).

Appeals Board found claimant had failed to prove his neck condition or any other alleged injuries or medical conditions were caused by the March 8, 1991, accidental injury. The Appeals Board specifically concluded that the temporary total disability benefits claimant received attributable to his neck condition or any other injury, other than the right shoulder injury, to the extent respondent had paid temporary total disability benefits, represented an overpayment. The Appeals Board also concluded any medical treatment costs paid by respondent for claimant's neck or any other injury, other than the right shoulder, and to the extent respondent has already paid such medical expenses, the respondent may seek reimburse for those expenses by application to the Director.

Claimant appealed the Appeals Board's Order to the Kansas Court of Appeals. But claimant's appeal was dismissed before it was decided by the Court of Appeals in a September 24, 1998, Order. In the Appeals Board's Order, the award was computed based on the total stipulated number of temporary total disability weeks respondent paid claimant in the amount of 98 weeks at \$278.00 per week or \$27,244.00. This temporary total disability amount included 20 weeks paid as a result of the preliminary hearing order for claimant's neck problems found by the Appeals Board to be an overpayment. Claimant was then awarded 317 weeks at the rate of \$61.56 per week or \$19,514.92 for a 21 percent permanent partial general disability, making a total award of \$46,758.52.

Respondent paid the Award entered by the Appeals Board in a check sent to the claimant in July 1998 and then the balance in a check sent to the claimant in October 1998. The respondent paid claimant the balance of the permanent partial general disability awarded less the overpayment of temporary total disability benefits in the amount of \$5,560.00 which was set off against the permanent partial general disability weeks owed. This set off was made in accordance with K.S.A. 1998 Supp. 44-525(c) which provides as follows:

In the event the employee has been overpaid temporary total disability benefits as described in subsection (b) of K.S.A. 44-534a, and amendments thereto, and the employee is entitled to additional disability benefits, the administrative law judge shall provide for the application of a credit against such benefits. The credit shall first be applied to the final week of any such additional disability benefit award and then to each preceding week until the credit is exhausted.

After claimant's appeal to the Kansas Court of Appeals was dismissed, he retained Mr. Valerius to represent him on February 25, 1999. A demand was made by Mr. Valerius on claimant's behalf in a letter dated March 25, 1999, to respondent's attorney. The demand was for the respondent to pay the balance of the total Award as computed that amounted to \$5,560.00 which was the 20 weeks of weekly temporary total disability benefits credited against the award for the overpayment. Mr. Valerius argued, in his demand letter to the respondent, that the overpayment of temporary total disability benefits should be obtained from the Workers Compensation Fund and not credited against the claimant's award.

Respondent did not agree with the demand and did not pay the overpayment credit to claimant. Claimant, therefore, requested a preliminary hearing on the overpayment issue.

On June 2, 1999, a preliminary hearing was scheduled before the Administrative Law Judge at claimant's attorney's request. But the Administrative Law Judge and the parties determined the matter should have been set for a penalty hearing pursuant to K.S.A. 44-512a and not a preliminary hearing. At that time, however, the parties agreed to submit to the Administrative Law Judge an order for the Judge's signature finding that the respondent had made a \$5,560.00 overpayment of temporary total disability benefits and pursuant to K.S.A. 1998 Supp. 44-534a(b) and requesting the Administrative Law Judge to order the Kansas Workers Compensation Fund to reimburse the respondent and its insurance carrier for that amount.

The Director, after receiving the Administrative Law Judge's August 16, 1999, Order for reimbursement of the overpayment of temporary total disability benefits along with respondent's further request for reimbursement of \$30,343.56 in medical expenses, certified to the Insurance Commissioner for the Workers Compensation Fund to reimburse respondent and its insurance carrier in the amount of \$35,903.56. After respondent received the reimbursement, the \$5,560.00 was paid to claimant. This dispute then arose between the claimant and his attorney, Mr. Valerius, as to the payment of attorney fees and expenses in regard to the \$5,560.00 recovery paid to the claimant.

It is clear from the record, that the respondent credited the \$5,560.00 amount of overpayment of temporary total disability compensation against the Appeals Board's award as computed in its May 28, 1998, Order. The overpayment credit was applied by the respondent against the final weeks of the permanent partial general disability award until the credit was exhausted. In this case, the credit was simply subtracted from the total amount of permanent partial general disability because that amount was all due and owing. It is also clear that K.S.A. 1998 Supp. 44-525(c) specifically provides for such a credit and the procedure to follow in making the credit.

The \$5,560.00 overpayment credit for temporary total disability benefits was paid to claimant based on Mr. Valerius' demand and subsequent settlement negotiations. The Appeals Board concludes, if Mr. Valerius had not been retained by the claimant and had not made a demand upon the respondent for the overpayment credit, respondent would not have paid claimant the credit. The Appeals Board concludes the \$5,560.00 credit amount paid by respondent to claimant is an additional award of disability compensation as delineated in K.S.A. 1999 Supp. 44-536(g). Accordingly, the Appeals Board finds the attorney fees owed Mr. Valerius for his efforts in making this recovery should be paid from the \$5,560.00 recovery pursuant to the attorney fee contract entered between the claimant and Mr. Valerius in the amount of 25 percent of the amount of the recovery plus reasonable expenses.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that Administrative Law Judge Bruce E. Moore's February 17, 2000, Order should be, and the same is hereby, affirmed in all respects.

IT IS SO ORDERED.

Dated this ____ day of August 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

The parties entered into an agreement, post-award, that respondent was entitled to be reimbursed \$5,560.00 by the Fund as an overpayment of temporary total disability compensation. This agreement was then adopted by the Administrative Law Judge by his Order of August 16, 1999. The effect of this agreement and Order was to make the \$5,560.00 part of the original award and to disallow the K.S.A. 44-525(c) credit respondent had taken. This became, therefore, a post-award proceeding brought to enforce an Award. It did not result in an award for additional benefits.

The Workers Compensation Act provides that a worker's attorney is entitled to reasonable attorney fees for the services rendered after the disposition of the initial claim. If those services result in an additional award of disability compensation, the attorney's fees are to be paid from the new award. Absent a new award, the attorney's fees are to be paid by the employer. The Act reads:

In the event any attorney renders services to an employee or the employee's dependents, subsequent to the ultimate disposition of the initial and original claim, and in connection with an application for review and modification, a hearing for additional medical benefits, an application for penalties or otherwise, such attorney shall be entitled to reasonable attorney fees for such services, in addition to attorney fees received or which the attorney is entitled to receive by contract in connection with the original claim, and such attorney

fees shall be awarded by the director on the basis of the reasonable and customary charges in the locality for such services and not on a contingent fee basis. **If the services rendered under this subsection by an attorney result in an additional award of disability compensation**, the attorney fees shall be paid from such amounts of disability compensation. **If such services involve no additional award of disability compensation**, but result in an additional award of medical compensation, penalties, or other benefits, the director shall fix the proper amount of such attorney fees in accordance with this subsection and **such fees shall be paid by the employer** If the services rendered herein result in a denial of additional compensation, the director may authorize a fee to be paid by the respondent.² (Emphasis added.)

As it is clear this post-award proceeding involved no additional award of compensation, respondent and its insurance carrier are responsible for claimant's attorney fees.

BOARD MEMBER

BOARD MEMBER

c: Joe Rome, Holcomb, KS
Seth G. Valerius, Topeka, KS
Rex W. Henoch, Lenexa, KS
Bruce E. Moore, Administrative Law Judge
Philip S. Harness, Director

²K.S.A. 1999 Supp. 44-536(g).